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**SECRETARY, BOARD OF
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**BEFORE THE BOARD OF OIL, GAS AND MINING
DEPARTMENT OF NATURAL RESOURCES
STATE OF UTAH**

UTAH CHAPTER OF THE SIERRA CLUB,
et al.,

Petitioners,

Docket No. 2009-019
Cause No. C/025/0005

DIVISION OF OIL, GAS AND MINING,

Respondent, and

ALTON COAL DEVELOPMENT, LLC, and
KANE COUNTY, UTAH,

Intervenors-Respondents.

**PETITIONERS' MEMORANDUM IN SUPPORT OF THEIR MOTION FOR
CERTIFICATION OF BOARD MEMBERS' STATUS CONCERNING FINANCIAL
INTERESTS IN COAL MINING OPERATIONS AND
FOR RECUSAL OF EACH MEMBER WHO HOLDS ANY SUCH INTEREST
THAT THE BOARD'S DECISIONS MAY AFFECT**

Utah Chapter of the Sierra Club (“Sierra Club”), Southern Utah Wilderness Alliance (“SUWA”), Natural Resources Defense Council (“NRDC”), and National Park Conservation Association (“NPCA”) (collectively, “Petitioners”) have moved that the Board require each of its members either (1) to certify in a publicly-accessible document that he or she does not have a direct or indirect financial interest in any Utah coal mining operation or in any other coal mining operation that the decisions of this Board may affect, or (2) immediately to recuse himself or herself from further proceedings in this matter. This motion is based on federal law that directly imposes a duty on members of this Board to recuse themselves in certain circumstances:

Members of advisory boards and commissions established in accordance with State laws or regulations to represent multiple interests, who perform a function or duty under the [Surface Mining Control and Reclamation] Act, shall recuse themselves from proceedings which may affect their direct or indirect financial interests.

30 C.F.R. § 705.4(d). This memorandum states the grounds for Petitioners’ motion and presents legal argument why each Board member should certify or recuse in response to Petitioners’ request.

I.

Federal Regulations Impose a Duty to Recuse on Each Board Member Who Has a Direct or Indirect Financial Interest in Any Surface Coal Mining Operation

In crafting the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1201-1328 (“SMCRA”), Congress expressly prohibited state officials charged with implementing the statute through approved state regulatory programs from holding a direct or indirect financial interest in any underground or surface coal mining operation. 30 U.S.C. § 1267(g).¹ Although the Secretary of the

¹ The text of 30 U.S.C. § 1267(g) provides:

No employee of the State regulatory authority performing any function or duty under this chapter shall have a direct or indirect financial interest in any underground or surface coal mining operation. Whoever knowingly violates the

Interior (“the Secretary”) has defined the term “employee” to exclude members of advisory boards and commissions established in accordance with State laws or regulations to represent multiple interests, *see* 30 C.F.R. §§ 705.5 (*Employee*) (recognizing the authority of States to establish multiple interest boards or commissions and exempting members of such boards or commissions from the status of “employee” of the state regulatory authority), the Secretary has nonetheless sought to ensure that no member of a state multiple interest board or commission participates in proceedings in which the member has a conflict of interest. To that end, the Secretary has promulgated a national rule requiring that:

Members of advisory boards and commissions **established in accordance with State laws or regulations** to represent multiple interests, who perform a function or duty under the Act, shall recuse themselves from proceedings which may affect their direct or indirect financial interests.

30 C.F.R. § 705.4(d) (emphasis supplied).²

provisions of this subsection shall, upon conviction, be punished by a fine of not more than \$2,500, or by imprisonment of not more than one year, or by both. The Secretary shall (1) within sixty days after August 3, 1977, publish in the Federal Register, in accordance with section 553 of title 5, regulations to establish methods by which the provisions of this subsection will be monitored and enforced by the Secretary and such State regulatory authority, including appropriate provisions for the filing by such employees and the review of statements and supplements thereto concerning any financial interest which may be affected by this subsection, and (2) report to the Congress as part of the Annual Report (section 1296 of this title) on actions taken and not taken during the preceding year under this subsection.

² Federal regulations such as 30 U.S.C. §§ 705.4(d) and 732.17(g) explicitly govern the administration and scope of state regulatory programs following the Secretary’s approval of them. These provisions do not apply to coal operators directly and thus do not become inapplicable after program approval, as courts have held that federal coal mining performance standards do.

To clarify the scope of prohibited interests that employees may not hold and that trigger the federal duty of multiple interest board members to recuse, the Secretary has defined the term “direct financial interest to mean:

ownership or part ownership by an employee of lands, stocks, bonds, debentures, warrants, partnership shares, or other holdings and also means any other arrangement where the employee may benefit from his or her holding in or salary from coal mining operations. Direct financial interests include employment, pensions, creditor, real property and other financial relationships.

30 C.F.R. § 705.5 (*Direct financial interest*). The regulations define “indirect financial interest” to mean:

the same financial relationships as for direct ownership, but where the employee reaps the benefits of such interests, including interests held by his or her spouse, minor child and other relatives, including in-laws, residing in the employee's home. The employee will not be deemed to have an indirect financial interest if there is no relationship between the employee's functions or duties and the coal mining operation in which the spouse, minor children or other resident relatives hold a financial interest.

Id. (*Indirect financial interest*); see also *id.* (*Prohibited financial interest*) (“any direct or indirect financial interest in any coal mining operation”).

Utah statutes establish this Board to represent expressly identified multiple interests in carrying out specific functions under the State’s approved regulatory program for implementing SMCRA. Utah Code §§ 40-6-4 (specifying that the Board shall be composed of members who variously are knowledgeable in mining matters, oil and gas matters, ecological and environmental matters, geological matters, and mineral royalty interests), 40-10-6 (empowering the Board to promulgate coal mining regulations and to do all other things necessary to enforce Utah’s approved state regulatory program), 4-10-14(3) (empowering the Board to adjudicate administrative hearing requests on decisions of the Division of Oil, Gas and Mining on coal mine permit applications). Accordingly, each member of this Board is subject to the federal duty to recuse from any proceeding

which may affect the member's direct or indirect financial interest. The types of financial interests that trigger the duty to recuse include all those generally or specifically identified at 30 C.F.R. § 705.17.

II.

Utah's Authority to Establish Multiple Interest Boards to Perform Duties Under SMCRA Does Not Lessen Any Member's Federal Duty to Recuse

Utah's choice to compose this Board of representatives of five expressly identified special interests does not relieve Board members from the duty to recuse themselves in accordance with 30 C.F.R. § 705.4(d). The United States Court of Appeals for the Fourth Circuit made this principle clear in upholding the Secretary's approval of West Virginia's multiple interest board for SMCRA matters, which closely resembles this Board in composition and function. The Fourth Circuit has specifically noted that, like the similar Utah statute:

W.Va.Code Sec. 20-6-23(a) does **not** permit members of the RBR [Reclamation Board of Review] to have financial interests in coal mining enterprises. It simply states that the Board is to be composed of five members who by reason of previous vocation, employment, training, or affiliations can be classed as capable and experienced in the areas of coal mining, agriculture, forestry, engineering and water pollution control. **These expertise qualifications in no way conflict with a prohibition against ownership of financial interests in coal mines.**

Tug Valley Recovery Center v. Watt, 703 F.2d 796, 800 n.5 (4th Cir. 1983) (emphasis supplied).³

Thus, States may compose multiple interest boards or commissions however they like, but to the

³ West Virginia has an approved state regulatory program for implementing SMCRA, just as Utah does. See 30 C.F.R. Part 948. West Virginia's Reclamation Board of Review was that State's initial rulemaking and administrative appeal authority. The West Virginia Legislature subsequently enacted W.Va. Code § 22B-4-1, which (among other things) renamed the entity "the West Virginia Surface Mine Board" and expanded its membership to seven by adding one member "with significant experience in the advocacy of environmental protection" and one member "who represents the general public interest."

extent there are direct or indirect financial conflicts, members of such boards or commissions may not hear matters regarding surface coal mining.

III.

Petitioners' Requested Certification/Recusal Procedure Is Essential to Effective Operation of 30 C.F.R. § 705.4(d)

The recusal duty established by 30 C.F.R. § 705.4(d) ensures the *due process* right of litigants to adjudicatory proceedings that are free from taint by conflict of interest on the part of any Board member. The exercise of that right – and indeed, the vitality of 30 C.F.R. § 705.4(d) itself – depends upon public disclosure of at least the minimum information essential to determine whether the duty to recuse does or does not apply to each member of this Board. Petitioners do **not** seek access to the financial disclosure documents that each Board member must file annually pursuant to 30 C.F.R. § 705.11(a), because Petitioners understand that these detailed filings may be exempt from public review pursuant to the federal Privacy Act and similar laws. Instead, Petitioners seek only the written statement of each Board member who proposes to participate in this formal adjudication affirming that he or she does not have either a direct financial interest or an indirect financial interest in any Utah coal mining operation or in any other coal mining operation which the decisions of this Board may affect.

The certification that Petitioners seek would not infringe any legitimate privacy interest of any member of this Board. Petitioners do not seek disclosure of detail concerning any financial interest that a Board member may have. Instead, Petitioners seek only compliance with the recusal duty of 30 C.F.R. § 705.4(d) or a member's certification that the duty does not apply to him or her as a matter of fact.

Such a procedure is the minimum necessary to ensure proper operation of 30 C.F.R. § 705.4(d). By granting Petitioners' request this Board will assure all litigants who come before it, as well as the public in general, that the Board's proceedings are conducted in scrupulous compliance with applicable law.

IV.

Any Direct or Indirect Financial Interest In a Utah Coal Mining Operation Triggers the Federal Duty to Recuse

The federal duty to recuse applies to each member of this Board who has any direct or indirect financial interest in any coal mining operation that this Board's decisions "may affect." At a minimum, that includes any financial interest in any Utah coal mining operation. This is so because the Board's decisions in formal administrative adjudications form a precedential body of administrative case law that prospectively governs all such operations. *Salt Lake Citizen's Congress v. Mtn. States Tel. & Tel. Co.*, 846 P.2d at 1245, 1253 (Utah 1995) ("rules of law established by adjudication apply to the future conduct of all persons subject to the jurisdiction of an administrative agency, unless and until expressly altered by statute, rule, or agency decision"). The precedential nature of each Board decision establishes that each proceeding which leads to such a decision "may" – indeed, actually does – affect the direct or indirect financial interest of each Board member who holds a direct or indirect financial interest in any Utah coal mining operation.

The federal duty to recuse also applies to each Board member who has a direct or indirect financial interest in a coal mining operation located outside Utah if the Board's decision in a specific case "may affect" the "outside" coal mining operation. For example, a coal mining operation located outside Utah may depend upon the ability to market coal to a power plant which in turn depends upon both Utah and non-Utah operations to supply the total amount of coal that the plant

needs. A Board decision on the issuance of a permit to the Utah coal supplier in such circumstances "may affect" a Board member's financial interest in the interlocked, non-Utah coal mining operation. If so, the member would have a duty under 30 C.F.R. § 705.4(d) to recuse himself or herself from the permit review proceedings. Petitioners respectfully urge each Board member to review the pertinent facts bearing on similar "may affect" relationships in same vein as the example just described.


Conclusion

For the reasons stated above, Petitioners request that each member of the Board either (1) certify in a publicly accessible document on file with the Clerk of the Board that he or she does not have any direct or indirect financial interest in any Utah coal mining operation or in any other coal mining operation which the Board's decisions "may affect," or (2) immediately recuse himself or herself from any further involvement in these proceedings.

Dated: March 10, 2010

Respectfully submitted,

By:


Attorneys for Utah Chapter of the
Sierra Club, *et al.*

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CERTIFICATE OF SERVICE

I hereby certify that on the 10th day of March, 2010, I served a true and correct copy of **PETITIONERS' MEMORANDUM IN SUPPORT OF THEIR MOTION FOR CERTIFICATION OF BOARD MEMBER'S STATUS CONCERNING FINANCIAL INTERESTS IN COAL MINING OPERATIONS AND FOR RECUSAL OF EACH MEMBER WHO HOLDS ANY SUCH INTEREST THAT THE BOARD'S DECISIONS MAY AFFECT** to each of the following persons via e-mail transmission and United States first-class mail, postage pre-paid:

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